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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRIAN MCMAHON,

Plaintiff and Appellant,

v.

DAVID WEST, et al.,

Defendants and Respondents.

B159873

(Los Angeles County
Super. Ct. No. BC 250918)

APPEAL from an order of the Superior Court of Los Angeles County.

Robert L. Hess, Judge. Affirmed.

Brian McMahon, in pro. per., for Plaintiff and Appellant.

Manuel S. Klausner and Patrick J. Manshardt for Defendants and
Respondents.

Plaintiff Brian McMahon appeals from an order granting terminating sanctions, including striking his complaint, pursuant to Code of Civil Procedure section¹ 128.7. Appellant contends that the court erred by granting the motion prior to the completion of discovery and that the court's imposition of monetary sanctions in excess of \$25,000 was not supported by the evidence and was unnecessary where other non-monetary sanctions were available. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

Appellant Brian McMahon contacted respondent Individual Rights Foundation (“IRF”) for legal advice concerning his termination from employment with the El Camino Community College District.

On May 21, 2001, appellant filed suit against a number of defendants asserting fraud, breach of fiduciary duty, and related causes of action for alleged wrongs in connection with the defendants alleged representation of him in pursuit of his legal claims for wrongful termination. Defendants named in the suit were IRF, the Center for the Study of Popular Culture (“the Center”), David Horowitz, the president of the Center, David West, Manuel Klausner, and Patrick Manshardt.

The court denied special motions to strike pursuant to section 425.16 brought by IRF, West, Klausner and Manshardt.²

¹ All statutory references are to the Code of Civil Procedure.

² In a separate appeal, also decided today, we reverse the trial court's order denying the special motions to strike as to West, Klausner and Manshardt and remand the cause with directions to the trial court to enter a new order dismissing the complaint as to those three individual defendants pursuant to section 425.16. In light of that holding, McMahon's appeal from the order dismissing the complaint against West pursuant to section 128.7 is moot. Because IRF did not appeal from the order denying the anti-SLAPP motion, we need not address whether the appeal from the order denying the anti-SLAPP motion effected an automatic stay precluding the trial court from entering its section 128.7 dismissal order.

On May 6, 2002, the court granted the section 128.7 motion of IRF, West, Klausner, and Manshardt for terminating sanctions and attorney's fees. The court found "there is and can be no factual or legal basis for the claims in plaintiff's Complaint" and "there is absolutely no basis shown for any of the claims asserted against either [West] or [IRF]." However, although the court granted the motion to strike the entire complaint as to the moving parties, because no attorney malpractice claim had been pled, it gave appellant leave to file an amended complaint for legal malpractice against Klausner and Manshardt only.³

Appellant filed a notice of appeal from the May 6 order as to Horowitz, West, the Center and IRF. Only IRF and West were parties to that order.

Appellant filed a first amended complaint, and, with the permission of the court, subsequently filed a second amended complaint ("SAC") against Klausner and Manshardt. Eventually, the court sustained without leave to amend Klausner and Manshardt's demurrers to the SAC.

DISCUSSION

Appellant has not "explain[ed] why the order appealed from is appealable" or provided "a summary of the significant facts limited to matters in the record" along with supporting any reference to matters in the record "by a citation to the record" as required by California Rules of Court, rule 14(a)(2)(B) & (C) & 14(a)(1)(C).

"A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (9 Witkin,

³ An order to strike from a complaint all causes of action against a defendant leaving no issues to be determined between him and the plaintiff is appealable as a final judgment. (Cf. *Wilson v. Sharp* (1954) 42 Cal.2d 675, 677.) Thus, the May 6 order is appealable as to IRF.

Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394.) “The burden is on the appellant, not alone to show error, but to show injury from the error.” (Emphasis deleted.) (9 Witkin, Cal. Procedure, *supra*, Appeal § 409, p. 461.)

Appellant states the court imposed \$25,000 sanctions against him. In the May 6 order the court stated, “[t]he moving parties may submit an application for an award of attorneys fees and expenses in connection with this motion within 20 days from service of this Order.” Although IRF, West, Klausner and Manshardt filed a memorandum of costs requesting attorney’s fees of \$25,004.50, there is no order awarding those fees in the record. Hence, there is no issue for this court to address.

Appellant states that if he had been given the opportunity to conduct discovery prior to the motion, he would have been able to authenticate press releases and document statements made by the defendants, etc. Appellant had a year to do discovery from the time of filing his complaint until the order granting the terminating sanctions. The court found “there is and can be no factual or legal basis for the claims in plaintiff’s Complaint” and “there is absolutely no basis shown for any of the claims asserted against . . . [IRF].” Appellant does not discuss how any discovery could change those rulings, i.e., how he could assert a viable cause of action against IRF.

DISPOSITION

Accordingly, we affirm the order striking the complaint against IRF. IRF to recover costs on appeal.

WOODS, J.

We concur.

PERLUSS, P.J.

MUÑOZ (AURELIO), J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.